Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	
Enhancement Act and Modernization of the	)	WT Docket No. 05-211
Commission's Competitive Bidding Rules and	)	
Procedures	)	
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	)	
	)	

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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EXECUTIVE SUMMARY

CTIA – The Wireless Association® ("CTIA") submits these comments in response to the *Further Notice of Proposed Rule Making* in the above-captioned proceeding. CTIA applauds the efforts of the Commission to ensure that the Advanced Wireless Service ("AWS") auction proceeds as scheduled on June 29, 2006. The upcoming auctions will be critical to the continued success of the vibrantly competitive United States mobile wireless industry as it continues to deploy new and innovative services.

CTIA opposes the tentative conclusion in the *Notice* that the Commission should restrict award of designated entity ("DE") benefits to otherwise qualified entities with a "material relationship" with a "large in-region incumbent wireless service provider." The Commission's proposal discriminates against large, in-market incumbent wireless providers and the designated entities that would partner with those carriers; while favoring their wireless, wireline, and non-communications competitors. The Commission proposes to do this without evidence of a widespread problem of market concentration, that DE partnering is a cause of such concentration, or that discriminating against larger in-market wireless providers would remedy the alleged problem. Indeed, the idea that undue concentration exists is undercut by the simple fact that a large incumbent carrier could directly acquire all of the licenses in the AWS auction.

The Commission's tentative conclusion also appears to overlook that the DE rules are meant to ensure that bona fide small entities get access to capital and technical expertise necessary to effectively compete in spectrum auctions. Small entities, not those that provide them access to capital and technical expertise, are the intended beneficiaries of the DE rules.

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COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA")[1] submits these comments in response to the *Further Notice of Proposed Rule Making* in the above-captioned proceeding.[2] CTIA applauds the efforts made by the Commission to ensure the Advanced Wireless Services ("AWS") auction is held on June 29, 2006. This AWS auction entails spectrum licenses available for nationwide Commercial Mobile Radio Services ("CMRS") for the first time in ten years. These spectrum licenses will enable the wireless industry to expand the provision of wireless broadband services to the public. However, the *Notice* adopts tentative conclusions that are troubling, as they single out large in-market carriers for detrimental treatment.

As discussed below, CTIA generally opposes the tentative conclusions in the *Notice*. In effect, the Commission proposes to discriminate against large, in-market incumbent wireless providers, who by the nature of being "in-market" are serving customers, while favoring their

[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. CTIA membership covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211 (rel. Feb. 3, 2006) ("*Notice*").

wireless, wireline, and non-communications competitors without evidence of a problem of market concentration caused by the largest wireless providers, or that such discrimination would remedy the alleged problem. As a factual matter, the *Notice* relies on questionable evidence. As a legal and policy matter, the *Notice* proposes to reverse, without any justification, numerous prior conclusions relating to the designated entity ("DE") rules and competition generally. Thus, the *Notice* proposes to embark on a path that does not address the problems it purports to fix. In so doing, the *Notice* curiously singles out large incumbent carriers for a vague prohibition on "material" relationships in a manner that is both arbitrary and capricious. CTIA urges the Commission to reject the tentative conclusions in the *Notice* and to move forward with the AWS auction using existing DE rules.

I. The Tentative Conclusions in the *Notice* Are Unjustified as a Policy Matter, and the Relief Is Wholly Inappropriate.

CTIA expresses grave concern regarding the stated rationale, means, and legality of the *Notice*. First, while the intent of the *Notice* appears to be reformation of the DE policies, there is no evidence cited in the *Notice* that those policies have been abused, that they have not been effective, or that their reformation would achieve any stated goal. The Notice acts upon an *ex parte* filed by Council Tree Communications, Inc. that argues larger carriers "have used relationships with DEs as a means to access for themselves those benefits and opportunities intended for DEs."[3] Council Tree's purported evidence of this usurpation is a few statistics showing that DEs with large carrier partners won a significant number of licenses in recent auctions. Additionally, all of these partnerships have been approved by the Commission. In order for the FCC to grant an application, it must determine that the DE was ***not*** controlled by its

[3] Letter from Messrs. Steve C. Hillard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005) ("Council Tree *ex parte*") at 2.

strategic partner. And, with respect to Auction No. 58, those DEs continue to hold the licenses they bid for and won.

Thus, CTIA is deeply troubled by the implicit assumption in the *Notice* that large carriers should be attributed the spectrum held by their DE partners in the absence of any suggestion of abuse. Moreover, to the extent individual cases of abuse are hypothesized, there is no suggestion that the Commission's application procedures—or audit procedures—are insufficient to address those cases or that any of the problems can be attributed to companies with revenues in excess of $5 billion annually.[4] If the Commission has determined that it should change the rules currently permitting non-attributable investment to occur, the *Notice* makes no attempt to justify a distinction between large incumbent carriers and any other class of non-attributable investor. Certainly the existing attribution rules do not differentiate between large incumbent carriers and other types of investors, so it is difficult to rationalize how a regulatory loophole might arise for large incumbent carriers.

Council Tree—and the *Notice*—conclude that the DE rules are not serving the purpose of disseminating licenses broadly to a wide range of applicants.[5] But, without justifying the imputed equivalence between large carriers and DEs with large carrier partners, this amounts only to the allegation that there is concentration in the wireless market by the largest carriers. The *Notice* appears to adopt this conclusion, potentially in conflict with a number of Commission decisions, including the elimination of the spectrum cap and cellular cross-ownership rule,[6] recent determinations regarding the highly competitive nature of mobile

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4 *See, generally,* 47 C.F.R. § 1.2110 *et seq.*

5 *Notice* at ¶8.

6 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, WT Docket No. 01-14 (2001) at ¶27 (sunsetting spectrum cap effective 2003, and noting that "actual competition

services,[7] and a series of individualized merger reviews where concentration was explicitly reviewed.[8] Indeed, the idea that undue concentration exists is directly undercut by the simple fact that a large incumbent carrier directly could acquire all of the licenses available in the AWS auction—the *Notice* only purports to redress concentration in the context of partnering with DEs. CTIA does not believe this conclusion can be supportable in view of overwhelming statistics that the commercial mobile radio services market is competitive to the benefit of subscribers.

The very thin line that purports to connect these unrelated points is the concept of a "material" relationship between a DE and a large incumbent carrier. This concept is drawn vaguely in the *Notice*, however, and there is no way of practically assessing the impact of prohibiting "material" relationships and whether such a prohibition would address any of the tentative conclusions in the *Notice*. The concept that a material relationship could include a financial or strategic relationship currently permitted under the DE rules, for example, should only be contemplated if there is direct evidence suggesting that the attribution criteria in the existing rules is defective—yet such a defect would presumably run to all potential investors, not just large carrier partners. Extending "material" relationships to include leasing activities abruptly reverses course, without the perquisite findings, of the conclusion in the secondary markets proceeding that such relationships should be permitted.

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among those firms already providing service has been the most significant factor in the gains that have been achieved in recent years").

[7] *See, e.g.*, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 05-71 (Sept. 30, 2005).

[8] Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002031766, *et al*., WT Docket No. 05-63 (rel. Aug. 8, 2005); Applications of Western Wireless Corporation and ALLTEL Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002016468, *et al*., WT Docket No. 05-50 (rel. Jul. 19, 2005); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0001656065, *et al*., WT Docket No. 04-70 (rel. Oct. 26, 2004).

As a result, CTIA is deeply troubled by the tentative conclusion in the *Notice* to single out large incumbent carriers for disparate treatment. In effect, the Commission seeks to discriminate against DEs who may wish to partner with large, in-region incumbent wireless providers compared with other competitors who are not above $5 billion or seeking to partner with a DE in region. Either the DE rules are systemically flawed, in which case the FCC should be considering revisions to the DE rules applicable to all investors, or the rules are effective, in which case differential treatment of large incumbent carriers must be separately justified. Indeed, given the defects in the justification and rationale for the *Notice*, as discussed below, CTIA believes the legality of any of the proposed rules is highly suspect.

Similarly, the Commission seeks comment on whether it should extend its proposed prohibition on DE partnering to all entities with a significant interest in "communications services."[9] This proposal, should it be adopted by the FCC, makes more sense when considering the competitive inequities that will exist between large wireless carriers and other large communications companies that may compete against the large incumbent carrier, but also suffers from comparable infirmities. As is true of the tentative conclusion to forbid DE partnering with large, in-region wireless providers, the proposal to preclude entities with significant interest in "communications services" would unfairly limit the list of entities that could partner with DEs. Moreover, the Commission has failed to define adequately the parties who would be governed by the "significant interests in communications services" label. The FCC's proposal seeks comment on including a broad category of businesses such as voice or data providers, content providers, equipment manufacturers, other media interests, and/or facilities or non-facilities based communications services providers as having "significant

[9] *Notice* at ¶11.

interests in communications services"[10] This proposal is extremely vague and leaves open to question as to what entities would be included in such an exclusion.

II. The *Notice* Neither Presents Evidence of Nationwide Marketplace Concentration Nor Proposes a Solution That Would Remedy That Problem if it Existed

Although courts regularly defer to agency expertise in administrative rulemakings, a court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[11] In evaluating whether an agency rule is arbitrary or capricious, a court considers a variety of issues, including whether the rule is "supported by substantial evidence and based upon a consideration of the relevant factors."[12] In articulating its tentative conclusion,[13] the Commission may be acting arbitrarily and capriciously both in establishing its goal of reducing the concentration of wireless licenses and in proposing the means of accomplishing that goal. Adopting the tentative conclusion would place the Commission in danger of being reversed based on an arbitrary and capricious review.

A. The *Notice* Does Not Cite Any Economic Evidence to Support Either the Ends or the Means Contained in Its Tentative Conclusion.

To survive judicial review, an agency cannot, without further elaboration, articulate either an end or a means of accomplishing that end but instead must show that its decision is "supported by substantial evidence."[14] When acting pursuant to § 309(j)(3), the Commission has a more specific obligation to provide a "supported economic justification" for its determination

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[10] *Id.* at ¶19.

[11] 5 U.S.C. § 706(2)(A).

[12] *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998).

[13] To the extent the Commission chooses to adopt its tentative conclusion and considers comments on other questions, such as the definition of "material relationship," the same concerns regarding the statute's text, arbitrary and capricious decision making, constitutional matters, and the timing of adopting the rules apply.

[14] *See, e.g.*, *AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (internal quotation marks omitted).

that a problem exists—in this case, that it must act to limit the concentration of wireless licenses—and how it should respond to that problem or need.[15] Indeed, one appellate court rejected as "arbitrary" a Commission decision to "preclud[e] a class of potential licensees from obtaining licenses" when it failed to provide a "supported economic justification" for the decision.[16]

As discussed above, the *Notice* does not cite any relevant economic evidence to support the contention that the larger wireless carriers have inappropriately entered into partnerships with DEs. In fact, as stated above, the Commission has authorized those combinations and made individual determinations that the designated entity retained control of the license. The Commission primarily supports taking action in the DE field by citing to a filing—Council Tree's *ex parte* letter—originally submitted to supplement a different proceeding.[17] The filing asserts that the largest wireless providers "have used relationships with DEs as a means to access for themselves those benefits and opportunities intended for DEs."[18] Beyond this lone assertion, the *Notice* does not cite to any facts in support of the idea that larger companies have circumvented existing DE rules. Rather, the Commission simply states a desire for "its small business provisions to be available only to bona fide small businesses" and a conclusion "that modifications to [its] designated entity rules are warranted."[19]

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[15] *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995); *see also BellSouth Corp. v. FCC*, 162 F.3d 1215, 1219 n.2 (D.C. Cir. 1999) (citing *Cincinnati Bell*).

[16] *Cincinnati Bell Tel. Co.*, 69 F.3d at 764.

[17] *Notice* ¶ 8 (citing Council Tree *ex parte*). The Commission acknowledged that the *ex parte* filing "in part supplemented [Council Tree's] petition for reconsideration of the Commission's order establishing service rules for [AWS] in the 1710-1755 and 2110-2155 MHz bands." *See Notice* ¶ 3

[18] Council Tree *ex parte* at 2.

[19] *Notice* ¶ 7.

Neither the *ex parte* nor the *Notice*, however, offers *any* actual facts in support of its allegation or its conclusion. Such a failure is not surprising, given that wireless carriers and any other entity desiring to partner with a DE must satisfy the Commission's current attribution regulations.[20] In order for a larger carrier to partner with a DE and for the DE to retain its privileged status, the provider may not acquire or maintain a controlling interest in the DE.[21] Additionally, the Commission had to approve the partnerships Council Tree presumably referenced in its allegations.[22] Thus, as discussed above, for Council Tree's allegations to be correct, the Commission's current rules—barring carriers from obtaining a controlling interest in a DE—and enforcement of those rules would have to have failed to prevent the "largest wireless companies [from] us[ing] relationships with DEs as a means to access for themselves those benefits and opportunities intended for DEs."[23] Although the Commission highlights in the *Notice* Council Tree's generalized allegation that the larger carriers somehow did something wrong,[24] neither it nor Council Tree offers any evidence of wrong doing. Consequently, it has not shown any reason to take immediate action.[25] Further, neither Council Tree nor the Commission acknowledges the benefits that flow to the designated entities that did partner with

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[20] 47 C.F.R. § 1.2110.

[21] *Id.* § 1.2110(b)(1)(i).

[22] *See, e.g.*, *id*. § 1.2105.

[23] Council Tree *ex parte* at 2.

[24] *Notice* ¶ 8 ("Council Tree concludes that the large carriers structured their relationships with designated entities as a means to realize for themselves the benefits and opportunities that the Commission had intended for small businesses.").

[25] For example, the concentration of licenses has provided a large portion of consumers with numerous options for nationwide and regional wireless service. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, 18 FCC Rcd 14783, 14823 ¶ 84 (2003) (reporting that seventy-one percent of Americans may select from among six or more wireless carriers, while eighty-three percent may choose from among five or more carriers).

large carriers. These small companies have been able to purchase spectrum rights and participate in a very competitive business while maintaining control of the licenses. That would seem to be the exact end state that both Congress and the Commission envisioned.

The *Notice's* and Council Tree's second allegation—that too many licenses have been concentrated in the hands of too few providers—fails for several reasons. First, as argued repeatedly above, it is a requirement of the *existing* FCC rules that each DE retain control of its license. Each of the DEs represents a provider that has control of its license. By definition, and by FCC rule, that license is not "concentrated" in anyone but the DE. Second, this tentative conclusion overreads the statute's mandate to "avoid[the] excessive concentration of licenses" by viewing the large carriers both as possessing market power in a specific geographic market and having control over the DE licenses. In drafting amendments to the Communications Act and discussing this particular provision, Congress made plain that it "d[id] not intend that the Commission should apply any particular antitrust or other test in order to avoid concentration of licenses, but rather should apply a common sense approach."[26]

Most importantly, Congress provided an instructive example: "If a *single* licensee dominates any particular service, or if it dominates a significant group of services, then the Commission should take that into account. . . . [T]his objective [should not] dominate the Commission's decision-making when it adopts regulations to implement the competitive bidding process."[27] The presence of four nationwide carriers along with regional and smaller wireless carriers differs substantially from the circumstance Congress suggested may require the

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[26] H.R. Rep. No. 103-111, P.L. 103-66, (May 25, 1993), reprinted in 1993 U.S.C.C.A.N. 378, 581 (1993). This version of the bill was adopted in conference. *See* H.R. Conf. Rep. No. 103-213, P.L. 103-66 (Aug. 4, 1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1171.

[27] H.R. Rep. No. 103-111, at 581 (emphasis added).

Commission's involvement. Second, as with the previous allegations, neither the Commission nor Council Tree has offered any: (i) economic support for its contention that the major wireless providers control 89 percent of the United States marketplace;[28] or (ii) economic justification as to why it needs to act *at this moment*, or in this proceeding.

Thus, Council Tree's bare allegations do not satisfy even the most lenient definition of "substantial evidence."[29] These unsupported claims do not represent the kind of economic justification the Commission must offer when it, as part of its tentative conclusion, prohibits DEs from partnering with a whole class of businesses to provide wireless services.

B. Barring Certain Wireless Carriers From Entering Into Partnership Arrangements With DEs Does Not Address the Purported Goal of Preventing the Concentration of Wireless Licenses.

The failure to cite supporting economic evidence extends to the Commission's attempt to show that limiting certain wireless carriers from supporting or partnering with DEs will reduce the concentration of licenses. Even assuming that the Commission has offered sufficient support to identify and justify its ends, it has failed to "articulate a satisfactory explanation for its action" by showing *how* the particular means it has chosen—that is, banning all DEs from partnering with certain wireless providers—will reduce the concentration of licenses in a meaningful way or prevent companies from evading the purposes of the DE regime.[30] Moreover, because the proposed approach "employ[s] means that actually undercut its own purported goals," it does not

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[28] *NPRM* ¶ 8 (citing Council Tree *ex parte* at 2).

[29] *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (defining "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (internal quotation marks omitted).

[30] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

satisfy rational basis review.[31] Under the revised rules, DEs that otherwise would have partnered with a large in-region carrier and participated in the auction may choose not to participate.

If the Commission is trying to address diversification of ownership, the *Notice's* tentative conclusion is a "curious way of going about it."[32] The tentative conclusion does not bar *all* wireless carriers with a presence in a market from partnering with DEs, but merely those who that have average revenues in excess of $5 billion.[33] Thus, if a wireless carrier below the $5 billion threshold has a presence in a given locality that is equal to or even larger than a large in-region carrier, it may partner with a DE. Under Council Tree's analysis, somehow there would be more diversification attributed to the DE that partners with a company below the threshold, even if in-market, than if the partnership were with a large carrier.

Additionally, the tentative conclusion does not bar any other well-funded entity from *any* other field—including virtually every other communications or information field[34]—from entering these auctions, partnering with DEs, and (again, according to Council Tree) establishing sham relationships. Although the *NPRM* broadly noted the distinction between barring relationships with large, in-region wireless providers and with "entities with significant interests in communications services,"[35] it limited its tentative conclusion simply to relationships with

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[31] *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985) ("Rational decisionmaking also dictates that the agency simply cannot employ means that actually undercut its own purported goals.").

[32] *Cincinnati Bell*, 69 F.3d at 764.

[33] *Notice* ¶ 11.

[34] These participants could include, *inter alia*, internet providers (AOL), internet search engines (Google), computer (IBM, HP) and software (Microsoft) manufacturers, cable providers, radio stations and networks, satellite services, television stations and networks, and wireline telephone providers.

[35] *Id.* ¶ 19.

larger wireless carriers that have a local presence.[36] When Congress has desired to treat one group differently in the Act, it has done so expressly.[37]

Furthermore, the conclusion only bars one *particular* transaction between DEs and larger wireless providers. Those same providers may continue to bid and to attempt otherwise to acquire licenses within the same area. Ironically, *only DEs* who fall within the Commission's tentative conclusion will suffer, as they will lose the opportunity to partner with established and supportive investors.

The tentative conclusion also appears to contrast with prior statements and practices of the Commission that supported the development of DEs. For instance, the Commission has concluded that a policy limiting affiliation with large carriers would be "contrary to [the Commission's] goal of providing legitimate small businesses maximum flexibility in attracting passive financing."[38] Further the Commission stated that such a policy would also "limit a small business' ability to raise capital and undermine [the Commission's] intention of promoting small business participation in the highly competitive telecommunications marketplace."[39] Additionally, the Commission has previously structured auctions and DE rules in a manner to allow DEs to acquire supportive financing.[40] The Commission has recognized the need to avoid

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[36] *Id.* ¶ 11.

[37] *See, e.g., Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 533-34 (2002) (citing § 251(c)); *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 798 (D.C. Cir. 2002) (noting, in a discussion of video descriptions and closed captioning, how Congress "treated the two technologies quite differently when it passed the Telecommunications Act which added § 713 to the Communications Act"). No such language appears in the Act to support the distinctions that the Commission has drawn in its tentative conclusion.

[38] *In re Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 15293, ¶ 65 (rel. Aug. 14, 2000).

[39] *Id.*

[40] *See, e.g., In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, Third Memorandum Opinion and Order, 9 FCC Rcd 6908, 6915 ¶ 45 (1994).

"encouraging undercapitalized firms to receive licenses for facilities which they lack the resources adequately to finance"[41] and the need to "allow designated entities to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital."[42]

By limiting the income opportunities for certain DEs, the tentative conclusion will limit the number of DEs that may flourish in a given locality and contradict these prior practices. It also will ironically run counter to Congress's desire to "disseminat[e] licenses among a wide variety of applications."[43] Consequently, the proposed bar on DE-incumbent wireless partnerships will not serve the Commission's stated goals but simply will harm certain DEs by foreclosing potential investors and much-needed venture capital.

In addition, the proposed geographic overlap rule potentially would preclude partnering in instances where the large, in-region provider has little or no presence in the relevant market. The proposal seeks to bar DE investment by an entity that has an overlap of at least 10 percent of the population within the impacted service area.[44] With such a low threshold of overlap, a large service provider who owns just a partitioned license that slightly overlaps in a market would be

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41 *In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 1297, 1341 ¶ 104 (1995) (citing *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2390 ¶ 234 (1994) (referring to the "intent of Congress in enacting section 309(j)(4)(A), to avoid a competitive bidding program that has the effect of favoring incumbents, with established revenue streams, over new companies or start-ups")).

42 *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd at 2389 ¶ 230; *see also In the matter of Amendment of Part 1 of the Commission's Rules--Competitive Bidding Procedures*, Third Order on Reconsideration of the Third Report and Order, 19 FCC Rcd 2551, 2562 ¶ 30 (2004) ("Our rules are designed to encourage entities that cannot meet their financial obligations to exit the auctions process sooner rather than later.").

43 *See* 47 U.S.C. § 309(j)(3)(B).

44 *Notice* at ¶18.

precluded from partnering with a DE to further extend coverage in the affected market. As such, CTIA recommends rejection of any attempts to establish a geographic overlap benchmark.

III. The FCC's Proposed Limitations Are Unnecessary To Ensure That Designated Entities Have Opportunities To Participate In The AWS Auction

The Commission has already taken several steps to ensure that DEs will have access to spectrum in the AWS auction. Initially, the FCC adopted a two-tiered bidding credit for small businesses.[45] The Commission defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. It provided small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent. The small business size standards and associated bidding credits for licenses in the 1710-1755 MHz and 2110-2155 MHz bands are the same as those the Commission adopted for broadband PCS.[46] The Commission concluded that the small business size standards and bidding credit levels that matched those offered in auctions of broadband PCS licenses were appropriate because broadband PCS presented service opportunities, capital requirements, and entry issues comparable to those presented by AWS.[47]

In addition, when adopting the AWS band plan, the Commission noted that in order to meet competing needs and to provide maximum flexibility, it would license the 1710-1755 MHz and 2110-2155 MHz bands using a range of geographic licensing areas, including large regional licensing areas, smaller licensing areas, and local licensing areas, across multiple spectrum blocks.[48] The Commission stated that by adopting such varied geographic licensing areas, it

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[45] *AWS-1 Service Rules Order,* 18 FCC Rcd at 25220 ¶ 149.
[46] *Id.*
[47] *Id*.
[48] *AWS-1 Service Rules Order* at 25175-76 ¶ 35.

would promote the policy goal of disseminating licenses among a wide variety of applicants.[49] Furthermore, with the revised band plan for AWS, there was an increase in the variety of licenses to meet the needs of potential new entrants as well as the needs of incumbents seeking additional spectrum, including providing more spectrum for MSA/RSA service areas. The FCC has determined that the AWS band plan creates a playing field in which the range of available licenses should encourage competition in each block among similarly sized applicants.

By establishing bidding credits for small business, a range of geographic licensing areas including relatively small areas, such as MSAs and RSAs, and a range of spectrum block sizes, the Commission has created an environment that will encourage participation in the AWS auction by smaller and rural entities.

IV. By Allowing the Bidding Requirements to Change After Parties Have Filed Their Applications, the Proposed Schedule Is Inconsistent With 47 U.S.C. Section 309(j)(3)(E)(ii).

Section 309(j)(3)(E)(ii) obligates the Commission, "after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services." Although the Commission has allowed the Bureau the flexibility to "announce, at any time in the weeks leading up to the start date of each auction, any minor, *non-substantive* amendments or clarifications,"[50] the fundamental eligibility criteria at issue in this proceeding is hardly minor or non-substantive. Rather, the Commission's tentative conclusion hits upon whether an entity may participate in an auction in the first place, a factor that has prompted the Commission in prior proceedings to adjust notice and comment timelines "to provide timely guidance to prospective

[49] *Id.*

[50] *In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures*, Third Report and Order and Second FNPRM, 13 FCC Rcd. 374, 449 ¶ 125 (1997) (emphasis added).

bidders."[51] By requiring parties to participate in the auction and *then*, if necessary, "amend their applications on or after the effective date of the rule changes,"[52] the *NPRM* creates the possibility of requiring interested parties "to develop business plans, assess market conditions, and evaluate the availability of equipment" *before* the "issuance of bidding rules." Such a sequence appears to be inconsistent with the language of § 309(j)(3)(E)(ii). CTIA believes that, the best course of action is not to adopt the proposals and tentative conclusions, and instead move forward in a timely manner with the auction under the existing designated entity rules.

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[51] *Wireless Telecommunications Bureau Sets Comment Schedule for Petitions for Reconsideration of First Report and Order in WT Docket No. 99-168*, Public Notice, 15 FCC Rcd 15739 (2000) ("Preliminary review of the petitions indicates they raise certain issues that potentially affect petitioners' decision whether to participate in the auction. To preserve the possibility of considering and resolving such issues sufficiently in advance of the auction to provide timely guidance to prospective bidders, we must close the record on reconsideration issues on an expedited schedule.").

[52] *Notice* ¶ 21.

V. Conclusion.

For the foregoing reasons, CTIA believes the *Notice* is fundamentally flawed. The Commission is proposing to remedy an alleged problem by arbitrarily discriminating against large, in-market incumbent wireless providers. The Commission should reject the tentative conclusion and move forward with the AWS auction as scheduled using existing DE rules.

Respectfully Submitted,

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